Hasrat Idaman Sdn Bhd v Mersing Construction Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–22–157 OF 2007
MARY LIM J
1 APRIL 2015

Contract — Building contract — Claim for work done — Failure to pay progress claims — Whether plaintiff to be paid based on actual quantities and upon re-measurement — Whether variation orders issued for additional work — Meaning of variation works — Whether re-measured works amount to variation work — Plaintiff unable to prove detailed makeup of claim — Claim rejected

Evidence — Witness — Credibility of — Witness unable to explain claim and unable to point out relevant supporting documents — Witness extremely wanting in his testimony — Evidence lacking in credibility or probative value — Whether court believing witness

The defendant was appointed as the principal subcontractor to carry out works in relation to 'Electrified Double Track Project between Rawang and Ipoh (Infrastructure Works)' ('the project'). The plaintiff was appointed by the defendant as a subcontractor for the utilities relocation for electrical works in the project. The plaintiff claimed that it had completed the works and a joint measurement had been conducted by the consultants. The plaintiff had made progress claims via 115 claims certificates amounting to RM9,779,933.52. The plaintiff pleaded that the defendant had paid a total amount of RM7,331,103.76. With a sum of RM138,665 conceded by the plaintiff as being appropriate to be deducted as contra, the plaintiff in this suit claimed for the balance of RM2,310,164.76. The defendant disputed the claim on the grounds that the plaintiff was to be paid according to actual quantities and upon re-measurement which had been certified by the consultants. It was the defendant's case that it never paid the plaintiff according to the plaintiff's claims certificates. Because the plaintiff's works was subject to re-measurement, the defendant paid against what was certified as having being re-measured. The defendant claimed that the plaintiff had been duly paid all its claims. The defendant denied having instructed or issued any variation orders for any additional work. The issue arising for determination was whether the additional works of RM2,310,164.76 was instructed by the defendant.

Held, dismissing the plaintiff's claim with costs of RM40,000:

(1) PW2 admitted in his evidence-in-chief that the additional works that the plaintiff had undertaken were not instructed by the defendant (see para 45).

(2) In the construction industry, the scope of works agreed between the parties are generally referred to as the 'original work'. The payment for such work may be subject to re-measurement for the final actual quantities as is the case here, using the rates in the bills of quantities ('BQ'). Re-measured works remain very much part of the original contract and is by no means variation work. On the other hand, any work which is instructed over and above the original works are referred to as 'additional' or 'variation works' (see para 48).

(3) PW2 was unable to explain how the plaintiff's claims were put together, how the documents were meant to be read. PW2 was unable to point out the relevant supporting documents for any of the claims referred to him. PW2 was extremely wanting in his testimony; his evidence lacked in credibility or any probative value and was of little assistance. In short, the court did not believe PW2 (see para 61).

(4) The plaintiff appeared to be adjusting its figures as the claim proceeded. The plaintiff's claim was simply not supported. It was not a case of just adding up the numbers in a claim for work done. The plaintiff had to prove, and prove strictly the detailed makeup of the claim. In this regard, the evidence was weak such as to undermine the plaintiff's claim (see para 62).

(5) Where the claim is for both additional and original works as was the case here, it is important that the plaintiff must be able to show that the additional works were ordered by the defendant failing which there can be no valid claim. There was no evidence that the work for which the plaintiff was claiming was indeed work which was ordered or instructed by the defendant. The defendant did not instruct the plaintiff on any additional work. The plaintiff's work under the contract with the defendant had been fully paid up (see paras 65 & 75).

[Bahasa Malaysia summary

Defendan dilantik sebagai subkontraktor utama untuk menjalankan kerja-kerja berkaitan 'Electrified Double Track Project between Rawang and Ipoh (Infrastructure Works)' ('projek'). Plaintif dilantik oleh defendan sebagai subkontraktor untuk penempatan semula utiliti untuk kerja-kerja elektrik di dalam projek. Plaintif menuntut bahawa ia telah menyiapkan kerja-kerja dan penilaian bersama telah dijalankan oleh pakar perunding. Plaintif membuat tuntutan beransur melalui 115 sijil tuntutan berjumlah sebanyak RM9,779,933.52. Plaintif memplid bahawa defendan telah membayar jumlah keseluruhan berjumlah RM7,331,103.76. Dengan jumlah sebanyak RM138,665 dipersetujui oleh plaintif sebagai wajar untuk ditolak sebagai

kontra, plaintif dalam tindakan ini menuntut untuk baki sejumlah RM2,310,164.76. Defendan mempertikaikan tuntutan tersebut atas alasan bahawa plaintif dibayar mengikut kuantiti sebenar dan atas penilaian semula yang telah disahkan oleh pakar perunding. Adalah kes defendan bahawa ia tidak pernah membayar kepada plaintif mengikut sijil tuntutan plaintif. Oleh kerana kerja-kerja plaintif adalah tertakluk kepada penilaian semula, defendan membayar terhadap apa yang disahkan setelah dinilai semula. Defendan menuntut bahawa plaintif telah dengan wajar dibayar kesemua tuntutannya. Defendan menafikan telah memberi arahan atau mengeluarkan apa-apa perintah variasi untuk apa-apa kerja tambahan. Isu berbangkit untuk penentuan adalah sama ada kerja tambahan sebanyak RM2,310,164.76 diarahkan oleh defendan.

Diputuskan, menolak tuntutan plaintif dengan kos sebanyak RM40,000:

(1) PW2 mengaku dalam keterangan utamanya bahawa kerja tambahan yang plaintif lakukan bukan diarahkan oleh defendan (lihat perenggan 45).

(2) Dalam industri binaan, skop kerja-kerja yang dipersetujui di antara pihak-pihak secara amnya dirujuk sebagai 'original work'. Bayaran untuk kerja sedemikian mungkin tertakluk kepada penilaian semula untuk kuantiti sebenar terakhir seperti kes ini, menggunakan kadar dalam 'bills of quantities' ('BQ'). Kerja-kerja yang dinilai semula kekal sebahagian daripada kontrak asal dan bukan bermaksud kerja pelbagai. Sebaliknya, apa-apa kerja yang diarahkan lebih daripada kerja-kerja asal dirujuk sebagai 'additional' atau 'variation works' (lihat perenggan 48).

(3) PW2 tidak dapat menjelaskan bagaimana tuntutan plaintif dibuat, bagaimana dokumen bermaksud untuk dibaca bersama. PW2 tidak dapat menunjukkan dokumen sokongan yang relevan untuk apa-apa tuntutan yang dirujuk kepadanya. Keterangan PW2 amat kekurangan; keterangannya tidak mempunyai kredibiliti atau apa-apa nilai probatif dan tidak membantu. Pendek kata, mahkamah tidak mempercayai PW2 (lihat perenggan 61).

(4) Semasa tuntutan diteruskan plaintif dilihat seperti memperbetulkan jumlahnya. Tuntutan plaintif jelas tidak disokong. Ia bukan kes yang hanya menambah angka dalam tuntutan untuk kerja yang dibuat. Plaintif mesti membuktikan, dan membuktikan secara ketat pembuatan terperinci tuntutan tersebut. Berkaitan ini, keterangan adalah lemah, maka telah melemahkan lagi tuntutan plaintif (lihat perenggan 62).

(5) Di mana tuntutan adalah untuk kedua-dua kerja tambahan dan asal seperti dalam kes ini, adalah penting bahawa plaintif mesti dapat menunjukkan bahawa kerja-kerja tambahan diperintahkan oleh defendan jika gagal tidak akan terdapat tuntutan sah. Tidak terdapat

keterangan bahawa kerja yang dituntut oleh plaintif adalah sebenarnya kerja yang diperintahkan atau diarahkan oleh defendan. Defendan tidak mengarah plaintif atas apa-apa kerja tambahan. Kerja plaintif di bawah kontrak dengan defendan telah dibayar sepenuhnya (lihat perenggan 65 & 75).]]]

Notes

For cases on claim for work done, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3295–3943.

For cases on credibility of witness, see 7(2) *Mallal's Digest* (5th Ed, 2015) paras 3377–3443.

Cases referred to

Ribaru Bina Sdn Bhd & Anor v Bakti Kausar Development Sdn Bhd & Anor [2007] 2 MLJ 221, CA (distd)

Selvaduray v Chinniah [1939] 8 MLJ 253 (refd)

Kamaleswari Shanmugam (Kamales & Partners) for the plaintiff.

Justin Voon Tiam Yu (Alvin Lai Kok Wing with him) (Justin Voon Chooi & Wing) for the defendant

Mary Lim J:

FACTS

[1] By letter dated 7 September 2001, DRB-HICOM, as contractor, appointed a company known as Azamme Sdn Bhd ('Azamme') to carry out works in relation Electrified Double Track Project between Rawang and Ipoh (Infrastructure Works) ('the project'). The works comprised two elements, the relocation of utilities and the Horizontal Directional Drilling Works ('HDD') works. Azamme, as the 'specialist subcontractor', subcontracted the project to the defendant as principal subcontractor vide letter dated 29 September 2001.

[2] According to the plaintiff's re-amended statement of claim, by letter dated 15 October 2001, the plaintiff was appointed by the defendant as a subcontractor oniy for the works in relation to 'Utilities Relocation for Electrical Works (TNB)' (the works) for a contract price of RM5,379,806.25 (subcontract). This means that the HDD works were not subcontracted to the plaintiff. Such works remained and were executed by the defendant themselves.

[3] The letter of award of this subcontract required the interim conditions of the specialist subcontract, technical specifications, working drawings, interim bill of quantities, interim payment schedule, interim programme, letter of award of the specialist subcontract dated 7 September 2001, and 29 September 2001, and any other documents that are identified, signed and

agreed by both DRB-HICOM and Azamme as forming part of the specialist subcontract works, or bound as an attachment to the above letters of award of specialist subcontract, 'to be deemed to form and be read and construed as part of this subcontract'. The contracts between DRB-HICOM and Azamme dated 7 September 2001 and 29 September 2001 between Azamme and the defendant are the specialist subcontracts that were envisaged.

[4] The plaintiff claimed that it had completed the works and a joint measurement had been conducted by the consultants. That joint measurement is said to have verified the extent of the plaintiff's works. The plaintiff had made progress claims via 115 claims certificates amounting to RM9,779,933.52. In its re-amended statement of claim, the plaintiff pleaded that the defendant had paid a total amount of RM7,331,103.76. With another sum of RM138.665 conceded by the plaintiff as being appropriate to be deducted as contra, the balance due and outstanding was a sum of RM2,310,164.76. The present claim is for that sum.

[5] The claim is disputed, in defence, the defendant claimed that the contractuai arrangements with the plaintiff have to be read together with the contracts between DRB-HICOM and Azamme and between the defendant and Azamme. From these arrangements, the plaintiff was to be paid according to actual quantities and upon re-measurement which have been certified by the consultants of DRB-HICOM. The defendant claimed that the plaintiff had been duly paid; in fact the plaintiff had been overpaid but the defendant decided against reclaiming the overpayment.

[6] The defence made some mention as to how around 2 June 2005, the principal contract was returned to the Government of Malaysia, the owner/employer of the project. UEM Construction Sdn Bhd was subsequently appointed to complete the project. The defendant then alluded to settlement arrangements between the parties involved after the government had taken back the project. The details of those arrangements are not important or relevant for the purpose of this case.

[7] Insofar as the actual defence to the claim is concerned, the defendant denied having instructed or issued any variation orders for any additional work, it is the defendant's claim that because some of the plaintiff's representatives, that is, Selvarajah a/l Perambalam and James Selvam a/l Sandanasamy were also involved in Azamme, the plaintiff had in fact been dealing directly with that company or even with DRB-HICOM and not, with the defendant. If any variation orders had been issued, it would have been under those arrangements and not, those with the defendant. The defendant claimed that it was not bound by such dealings and that it is not obliged to pay for any variations ordered by Azamme and/or DRB-HICOM.

[8] It was the defendant's case that it never paid the plaintiff according to the plaintiff's claims certificates. Because the plaintiff's works was subject to re-measurement, the defendant paid against what was certified as having being re-measured. Fifteen interim certificates were issued showing the certified re-measurements. The defendant had paid according to those interim certificates. Since the two consultants did not certify any payments as due and owing to the plaintiff, the defendant claimed that there was nothing due to the plaintiff.

[9] It was further the defendant's case that a total sum of RM7,539,230.59 had been certified for works done by the plaintiff under the original contract until September 2004. The defendant claimed that it had paid a sum of RM7,519,887.64 leaving a sum of RM19,342.95 remaining unpaid.

[10] The defendant had also examined the details of the amount claimed. According to the plaintiff, it had done works to the tune of RM9,779,933.52 and had submitted progress claims for that sum. This amount comprised the sum of RM6.336.543.81 for work under the original contract value of RM5,309,806.25, and a further sum of RM3,443,359.71 for work done pursuant to variation orders, it is the defendant's case that since the plaintiff had itself set out that the value of work done under the original contract as RM6,336,543.81, but with the defendant having already paid the plaintiff a sum of RM7,519,887.64, it would appear that the defendant had in fact, overpaid the plaintiff. As mentioned earlier, the defendant has decided not to pursue a claim for the return or refund of the overpayment.

[11] At para 6 of its reply, the plaintiff alluded to being furnished a detailed method statement (DMS) which contains details of the works that the plaintiff was obliged to execute under its subcontract with the defendant. This DMS contained the orders instructed by the defendant. The DMS formed the basis of the claim for variation work. Since the plaintiff was merely following the DMS, the plaintiff claimed that it should be paid accordingly.

[12] As for the matter of Selvarajah a/l Perambalam and James Selvam a/l Sandanasamy, the plaintiff claimed that these two persons were representatives of Azamme and the defendant at the material time. Hence, their actions were binding on the defendant.

AGREED ISSUES

[13] These were the two agreed issues:

(a) Whether the additional works of RM2,310,164.76 was instructed by the defendant?

(b) If so, how much of the construction works was to be measured and paid? A

TESTIMONIES

[14] Two witnesses testified for the plaintiff. The first was Ir Zahri Abdul Ghani ('PW1'), the deputy project director of DRB-HICOM at the material time. He testified on the dealings between DRB-HICOM and Azamme. B

[15] According to PW1, the works undertaken by Azamme were based on drawings given by DRB-HICOM to Azamme. For this purpose, a utilities survey drawing would be provided to Azamme who then surveyed the sites and prepared a detailed method statement ('DMS') with revised shop drawings to reflect any new findings on their scope of works. DRB-HICOM would then approve the drawings with any omissions and/or additional work. This revised DMS was then given to Azamme for them to undertake the works. C D

[16] PW1 further testified on how payments for works done were made. It was based upon certification relying on joint measurement sheets ('JMS'). Again, this was prepared by DRB-HICOM for the purpose of ascertaining the measurement of work completed. He told the court that DRB-HICOM required these documents for payments to be made to the contractors. He further told the court that the JMS must bear the signatures or endorsements of the appointed consultants. Here, either Ranhill or Minco. These consultants would have done the measurements together with the contractors when work was completed and such measurements were necessarily done at site. When the accounts were finalised with Azamme, the JMS were relied on as proof of the amount of work that had been completed at the site which DRB-HICOM had checked against the revised DMS. E F

[17] PW1 also told the court that DRB-HICOM did not continue with the project, the reasons are not important for the purpose of this case save to say that the government and DRB-HICOM could not agree on 'some contractual matters'. This led to a mutual termination with DRB-HICOM handing over the site and finalising the account for those contractors who had undertaken the work. In this respect, PW1 testified that Azamme was paid RM2.5m by the government on 3 August 2006 pursuant to a deed of settlement signed on 10 May 2006 between DRB-HICOM and Azamme. That deed was made after the accounts had been finalised on 31 May 2005. G H

[18] The plaintiff's other witness was Selvarajah a/l Perambalam, PW2. He is one of the plaintiff's directors. He first testified as to scope of the plaintiff's work in that it was 'to remove, relocate or supply the existing cables, overhead and underground cables to accommodate the double track project. This also I

included removal and installation of electrical poles and providing all necessary fittings in accordance to the authorities requirements'.

[19] PW2 informed the court that the plaintiff was provided with a utilities survey drawing (that which was referred to by PW1). Using that survey drawing, the plaintiff proceeded to survey the site, prepare a DMS with a revised shop drawing to reflect their new findings on their scope of works. According to PW2, this was all 'done in the presence of TNB and the consultants who were there to approve and consent to the re-location of the actual scope of the work. Wherever there were geological/other changes it was detailed in the DMS. Any works that was not detailed in the initial Tender BQ document were the additional works that had to be carried out'.

[20] PW2 also testified on how the plaintiff made its claims. According to PW2's testimony, the plaintiff supported their claims with the JMS. He told the court that the JMS was a 'form for the tabulation of the completed works undertaken at a particular location which is to be certified by the client and the consultant'. The JMS was signed by DRB-HICOM's representative, the consultants and us, for all works executed and completed according to the requirements'. The JMS was endorsed or certified at site (see Q&A 15).

[21] PW2 further testified that the initial JMS were signed by the defendant's representatives but sometime after the first few claims, the defendant requested and authorised the plaintiff to sign the JMS on behalf of the defendant, who were the subcontractors'. Once the JMS were signed, the plaintiff would then prepare their claims. PW2 also told the court that the defendant was notified of the re-measurement and when claims were made, the 'JMS is there for them too'.

[22] PW2 also testified as to why the JMS and the claim certificates bore the name of Azamme as opposed to the defendant. According to him, the plaintiff was initially supposed to be the subcontractors to Azamme. However, there was a change with the defendant, a related company being appointed in place of the plaintiff. Despite this change, the plaintiff kept to the same format for payment. The plaintiff presented claims using JMS and interim claims with the name of Azamme instead of the defendant. The format was never an issue with the parties.

[23] PW2 told of how a total of 115 claim certificates were presented by the plaintiff against which payment was made by the defendant. The claim certificates were submitted together with JMS and valuation reports (pp 1–349 of Bundle A1) and these claims were acknowledged by one Mr Lee, of the

defendant. The claim certificates were all signed by PW2 but the JMS and valuation reports were with signed by PW2 or James Selvam, the plaintiff's project engineer at the material time.

[24] PW2 further informed the court that the defendant issued 15 payment certificates found at various pages in Bundle A3, the total value of these certificates being RM7,539,230.59. The total value of the plaintiff's 115 claims was RM9,779,933.52. The defendant had paid a total sum of RM7,519,887.64 as at February 2006 (this differs from the amended statement of claim which talks of the defendant having paid a total sum of RM7,331,103.76). Be that as it may, PW2 was unable to tell which of its 115 claims was still not paid because the defendant is said to have not at anytime specify which claim certificate was being paid. So, as far as the plaintiff was concerned, 'there are sums outstanding on all the claim certificates 1 to certificate no 115'.

[25] According to PW2, the plaintiff had orally sought breakdowns of the defendant's payments but these were never acceded to. Despite not being paid in full, PW2 testified that the plaintiff continued working because this was a re-measured contract; that the period of completion was eight months and the plaintiff did not want to delay the works and face LAD issues; that the defendant had reassured the plaintiff that it would be paid as soon as its accounts department had sorted out the defendant's finances.

[26] PW2 also testified that the 115 claims exceeded the contract sum of RM5,379,806.25 because the plaintiff had undertaken 'additional works and the re-measurement showed the increase in the works undertaken'. Although the plaintiff did not obtain instructions from the defendant to carry out the additional works, it was nevertheless making a claim because 'the nature of contract required us to undertake the works in accordance with the detailed method statement ('DMS') which was approved and provided by DRB to the defendant who then provided us the same'. PW2 also explained that 'the DMS was prepared a long time before the commencement of the project works based on the survey work with the authorities personnel (TNB) and consultants. The amendments were all in the DMS and the defendant were well informed of any changes in the work scope from the main contract. Any work that is detailed in the DMS, after the site visit, which was not in the initial tender documents are deemed to be additional work. The defendant was aware because nearly 80% of our work required their HDD work to be undertaken. Thus, the defendant already knew the need for the additional works when the work commenced. That is why it was a re-measured contract'.

[27] PW2 testified that the works were deemed completed in September 2004 when the plaintiff handed over all the handover documents to the

defendant through its letters dated 9 August 2004 and 21 September 2004. The final accounts were then submitted 'sometime in August and September 2006'. The two year lapse between the completion of the works and the submission of the final accounts was due to negotiations taking place between Azamme and DRB, thus we are not to submit final accounts until we were told by the defendant'. They were only told in September 2006.

[28] The plaintiff also offered a 'table and summary' of its claims found at pp 49–52 of Bundle A2. PW2 testified that it was prepared following the defendant's letter dated 15 August 2006 found at p 35 of Bundle A2. Although prepared by James Selvam, PW2 testified that the source of information was 'based on all claims the plaintiff had made, the payments made by the defendant, the interim certificates issued and the breakdown provided by the defendant through a tabulation that was provided together with the certificate No 14 at p 47 Bundle A2 when they paid RM100,000 to our company in May 2005'. A detailed breakdown was obtained from Mr Lee, the defendant's contracts executive. Although this table was sent to the defendant and duly acknowledged, PW2 testified that the defendant still did not pay.

[29] This was the evidence led by the defendant. Two witnesses testified for the defendant.

[30] The first was Lim Chee Kon ('DW1') the managing director of the defendant. He told the court that the plaintiff's claim was 'baseless' and that the defendant was not liable because the defendant did not issue any variation orders for the additional work/variation orders. According to him, the plaintiff actually took instructions from DRB-HICOM and their consultants and not from the defendant for these works.

[31] According to DW1 too, although the value of the original contract was only RM5,379,806.25, the defendant had nevertheless paid the plaintiff a sum of RM7,519,887.64. The defendant had paid this sum despite inconsistencies in the documents relied on by the plaintiff and the figures claimed by the plaintiff. DW1 said that the amount was paid because the defendant was obliged to pay upon re-measurement and certification by the consultant. Since the consultant had certified a total sum of RM7,539,230.59 as the sum due under the original contract, the defendant had paid RM7,519,887.64 to date leaving a balance sum of RM19,342.95 that remains unpaid. The defendant was prepared to concede that this sum balance was due but nothing else. Hence, in DW1's words, the defendant had been 'more than fair' to the plaintiff.

[32] DW1 then detailed his reasons as to why the defendant claimed that there was nothing due to the plaintiff under the original contract.

[33] First, DW1 said that together with the present claim in court of RM2,310,164.76, it would mean that the total value of the plaintiff's work was over RM9m (RM9,779,933.52). Since the original contract sum was about RM5.3m, he told the court that the present claim for the sum of RM2,310,164.76 'is clearly a claim for VO' and not for re-measured works. At Q&A 10 of his witness statement, DW1 explained that:

> Re-measurement is different from VO. When we awarded the works to the plaintiff, there are measurements mentioned in the Bill of Quantities (BQ). The BQ shows the quantities, measurements and specifications of the works to be done. The contractor has to follow the measurements provided in the contract. It is an industry standard to provide a margin of 3% difference for re-measurement. A margin of about 3% us allowable for re-measurement.

[34] DW1 testified that re-measured works remained as part of the original works while variation works would comprise a change of contract as new instructions or approval are given by the defendant to the plaintiff for such works to be done. New rates and quantities will have to be agreed between the parties before any work can commence. Since there were no instructions from the defendant for such work, the question of agreeing to new rates and quantities just did not arise. In any case, there were no approvals or certifications in these additional or variation orders.

[35] DW1 further testified that the defendant paid against 15 payment certificates that it had issued. These certificates of payments found at pp 1–51 of Bundle A3 together with the proofs of payments and the statement of accounts as at 22 March 2007 found at p 140 of Bundle A3 were offered in support of its case, DW1 told the court that the defendant did not rely on the plaintiff's 115 claims certificates or the JMS when making payment. It relied on the agreed basis, which was re-measurement. In DW1's words, the 15 certificates were 'based on the defendant's evaluation of the works'. Each of those certificates showed certifications of amounts which were less than what the plaintiff had claimed. Again, in DW1's own words, this 'is actually a clear answer to the plaintiff that the defendant is not agreeing to their whole claim and to pay anymore'.

[36] In any case, DW1 testified that the JMS were neither prepared by the defendant nor were they acknowledged by the defendant although some copies were given to the defendant. As far as the defendant was concerned, the plaintiff should be making its present claim with Azamme or even DRB-HICOM, but not the defendant.

[37] DW1 pointed out that the plaintiff's 115 claims certificates were addressed to Azamme. He explained that although the plaintiff had entered

into the present subcontract with the defendant, quite apart from dealing with DRB-HICOM directly, the plaintiff also dealt directly with Azamme.

[38] DW1 explained that both PW2 and James Selvam took up positions in Azamme as its 'Project Manager' and 'Project Engineer' respectively – see pp 12 and 16 of Bundle A1 where PW2 and James Selvam signed in those capacities for Azamme. In fact, PW2 even signed as Azamme's Project Manager in one of the letters of award between Azamme and DRB-Hicom – see p 101 of Bundle A3. DW1 informed the court that the defendant never appointed PW2 as its project manager nor could it have possibly done so as it had Mr Chen Kok Yin (also referred to by PW2 in his testimony) as its own project manager. He added that the defendant never authorised PW2 or James Selvam to act on its behalf. He also explained how the defendant and Azamme were unrelated companies with completely different shareholders. That remained unchanged even though his brother was a director with Azamme. He denied the contractual arrangements claimed by PW2. With all these dealings conducted at several levels at around the same time, it was DW1's evidence that the plaintiff should be making its present claim either to Azamme or DRB-H1COM; but not to the defendant.

[39] Ng Kar Ling (DW2) was the defendant's former assistant contracts manager. She was in charge of the contract documentation and contract accounting side of this contract as part of her job in assisting PW1. She, too, testified that the defendant never gave any instructions or approval for any additional or variation works for this project.

[40] DW2 went through the 115 claims certificates and the JMS. She found that the plaintiff's own claims certificates did not support its claims. She added up all the amounts making up the plaintiff's claims and found that the claims for additional or variation works totalled RM106,141.75. According to PW2, from the 349 pages found in Bundle A1 only claim certificates Nos 30, 32 and 40 contained claims for additional or variation works (pp 84, 90 and 115 of Bundle A1). Yet, the plaintiff claimed a sum of RM3,443,359.71 for such works. It was her testimony that the plaintiff's table and summary (found at pp 49–52 of Bundle A2) 'is completely out of place and irrelevant. Finally, it is not based on actual claim certificates'.

[41] It was DW2's evidence that the plaintiff could not use Azamme's claims and DRB-HICOM's purported certificates as a comparison for several reasons. Amongst the reasons proffered was that the plaintiff had failed to take into account that the contract works between Azamme and DRB-HICOM included the HDD works which were never contracted to the plaintiff. Therefore not only would the scope of works be compietely different, so would the contract values.

[42] DW2 prepared two comparison tables (pp 11–12 of Bundle A4) to further explain this and to show how from a contract accounting perspective, 'the plaintiff's claim cannot be supported at all'. She was not cross-examined on this methodology.

First issue: Whether the additional works of RM2,310,164.76 was instructed by the defendant?

[43] When one looks at this issue, it would appear that it invites the court to determine the question of whether the defendant had in fact instructed these additional works for which the plaintiff now claims, if the answer is in the positive, the court will be required to deal with the second issue of quantum. If, however the answer is in the negative, then the second issue will not arise.

[44] At paras 5 and 6 of the re-amended statement of claim, the plaintiff's claim is that it had completed ail work including additional works which the defendant had instructed the plaintiff to carry out. The defendant has however, not fully paid for such work.

[45] However, PW2 admitted in his evidence-in-chief (Q&A 32) that the additional works that the plaintiff had undertaken were not instructed by the defendant. Despite this, the plaintiff is nevertheless making such a claim because according to PW2, 'the nature of contract required us to undertake the works in accordance with the detailed method statement ('DMS') which was approved and provided by DRB to the defendant who then provided us the same'. Because the DMS was amended after the plaintiff's survey and that the defendant was 'well informed of any changes in the work scope from the main contract ... any work that is detailed in the DMS, after the site visit, which was not in the initial tender documents are deemed to be additionai work'. PW2 also told the court that 'The defendant was aware because nearly 80% of our work required their HDD work to be undertaken; Thus, the defendant already knew the need for the additional works when the work commenced. That is why it was a re-measured contract'.

[46] From the submissions of learned counsel for the plaintiff and from the evidence of PW2, I understand that the plaintiff has interchangeably used the terms 'additional' and 'variation' works in its claims. Again, these works are contrasted with the original works. Now, because the value of the plaintiff's works was subject to re-measurement and ascertainment in accordance with the provisions of the specialist subcontract and the principal subcontract and this subcontract, the plaintiff believes it must be paid once its works have been re-measured, verified and certified by the consultants. The plaintiff relies on the DMS as the basis of its claim and the fact that it had used the same methodology of work as that referred to in the principal contracts; it claims that it must be paid.

[47] To sum up what the plaintiff means by all this is that because DRB-HICOM had provided Azamme the utilities survey where that survey must have been passed on to the subcontractors by Azamme, it is sufficient if the plaintiff shows that its works followed the revised DMS which it had prepared and forwarded to the defendant. DRB-HICOM is said to have approved the drawings 'with all omissions and/or additions, where applicable to the scope of work'. It was the plaintiff's case that the 'DMS is a preliminary document that was mandatory for parties to follow'. The plaintiff repeatedly claimed that the defendant must have been aware of the revised DMS, and that it was the defendant who provided the DMS in the first place. Since it was the defendant who had provided the plaintiff with the DMS, the plaintiff contended that 'there is no issue of variation orders as this is a re-measured contract'. Hence, it would appear that the actual issuance of instructions from the defendant on such works would appear to be immaterial in the eyes of the plaintiff; as explained by PW2.

[48] With respect, the court disagrees. In the construction industry and this subcontract is no exception, the scope of works agreed between the parties are generally referred to as the 'original work'. The payment for such work may be subject to re-measurement for the final actual quantities as is the case here, using the rates in the bills of quantities ('BQ'). Re-measured works remain very much part of the original contract and is by no means variation work. On the other hand, any work which is instructed over and above the original works are referred to as 'additional' or 'variation works'. Before such works are done, the parties would have discussed and agreed on the applicable rates and other details in relation to such work. Following agreement between the parties, a proper instruction including a variation order ('VO') is then issued for the subcontractor to commence such work. The VO forms the basis for any additional claim for work done.

[49] In its claims, including progressive claims, a claimant, including the plaintiff, would have demarcated and tabulated precisely what was being claimed, whether the relevant claim was for work done under the original works, additional or variation works; supporting all these claims with the necessary documents. The paying party, generally through an engineer, architect or quantity surveyor (or all three) would then evaluate the claims according to the terms and conditions of the contract before certifying the value of all works done, whether as original or additional/variation works.

[50] In this case, it would appear from the identified issues that the plaintiff has treated both the original and variation works as one and the same. This is apparent from PW2's testimony. Yet, in the documentations prepared by the plaintiff each time it submitted its claims and even in the table and summary of claims prepared long after the work had been completed, the plaintiff distinctly

separated the works done under original works from works which it had regarded as 'variation' or 'additional works'. Please see pp 39–41 of Bundle A2 for the plaintiff's first table and summary of claims and pp 49–52 of the same bundle for the second table and summary. In this second summary, the plaintiff compared its claims to those claimed and paid between DRB-HICOM and Azamme.

[51] On this basis alone, the court is extremely stretched in trying to find for the plaintiff. Given that the plaintiff had assumed all works 'identified in the DMS as forming the scope of its works, the plaintiff's explanation is unconvincing when its own documentation belies its understanding and explanation given in court today.

[52] In any event, the court needs to deal with the issue of what precisely was the scope of the plaintiff's work. Here, the court is also constrained as the relevant contract documents were not tendered.

[53] According to the letter of award of the subcontract dated 15 October 2001, the plaintiff was subcontracted the whole of the 'utilities relocation for electrical works (TNB) under UEC' except HDD works. Although the letter of award refers to the scope of the plaintiff's works 'shall be the whole of the above' as stated in the specialist subcontracts (7 September 2001 and 29 September 2001) and the principal subcontract (15 October 2001 between Azamme and the defendant), these latter contracts were never tendered in evidence. The value of the subcontract was based on the interim bills of quantities that was attached to the letter of award. The actual and correct quantities and corresponding value of the subcontract price was however subject to re-measurement and ascertainment in accordance with the specialist subcontract, the principal subcontract and the subcontract.

[54] While this means that all three or four contracts will have to be read together, the court can only do so if all those contracts are in fact produced in evidence. They were not; only the subcontract dated 15 October 2001 between the present parties and the first of two specialist subcontracts between DRB-HICOM dated 7 September 2001, found at pp 1–45 of Bundle A and pp 96–117 of Bundle A3 respectively, were tendered. However, that first of two specialist subcontracts was only for the initial works in respect of utilities relocation where the contract value was only for RM675,790.50. Since Azamme had subcontracted the whole of the project to the defendant, that could not possibly be the contract which was subcontracted to the defendant for the defendant's subsequent subcontract to the plaintiff. The defendant's subcontract to the plaintiff was to the value of RM5,379,806.25.

[55] As I have said, this had posed some difficulty for the court, first and foremost in determining the scope of the plaintiff's work. Added to this is appreciating how the arrangements worked between one set of contracting parties with the next set of contracting parties under the specialist subcontracts, the principal subcontract; and this subcontract (in actuality sub-subcontract). The plaintiff may have used the format mentioned in the principal subcontract but that does not detract from the fact that the present claim concerns the underlying subcontract between the plaintiff and the defendant; and not between the plaintiff and any other party. For the plaintiff to succeed in its ciaim against this defendant, it must be shown that its claims relate to the subcontract works and that it had followed the agreed terms of this subcontract. It is not enough that the plaintiff followed some arrangements with DRB-HICOM which arrangements were those agreed between DRB-HICOM and Azamme and between Azamme and the defendant. The plaintiff must instead, show that the parties had agreed that the arrangements under the specialist subcontracts were mimicked in the present subcontract; and that the parties before the court had agreed to the plaintiff dealing directly with DRB-HICOM or even Azamme.

[56] No such evidence was presented. What was presented in evidence very much pertained to the plaintiff's dealings which it had with parties other than the defendant. Those parties being DRB-HICOM and/or Azamme; not the defendant. For example, the explanation proffered by PW2 in respect of the revised DMS, how it was conducted in the presence of DRB-HICOM and the consultants, that exercise did not involve the defendant but DRB-HICOM. Not only does this compound the problem of not being able to establish the plaintiff's claim, it lends weight to the defendant's arguments that the plaintiff's claim should be against DRB-HICOM or even Azamme, but certainly not against the defendant.

[57] The next problem the court has is with the DMS itself. In essence, the plaintiff had contended that the DMS contained the scope of the plaintiff's works. When the DMS was revised, the DMS then contained both the original and additional works. Since the DMS was the document under which Azamme operated with DRB-HICOM, then it must have been the same format between Azamme and the defendant; and between the defendant and the plaintiff.

[58] For this argument to be credible, the DMS must first of all be produced. It was not. Despite stressing on the importance and significance of the revised DMS, that it contains the scope of the original and additional works, it is surprising that the plaintiff never produced the DMS, including the revised DMS, at trial. Since the actual existence of this document was in dispute; with the defendant denying that it had given the document to the plaintiff; or that

it was ever given such a document by Azamme, it was imperative that the document be produced. It was not, and no explanations were forthcoming on this absence or lapse. What the court had instead were these rebuttals from DW1, a witness that the court did not find any reason to disbelieve especially when his denials and explanations were backed up and confirmed by PW1. PW1, from DRB-HICOM, told the court in quite clear terms that DRB-HICOM never gave the DMS to the defendant. In the light of such evidence, the plaintiff's explanation of the circumstances surrounding the instructions on its works including its scope of works becomes more questionable and less credible.

[59] Next, the court noticed that nowhere in his evidence did PW2 say that the DMS and the revisions done to the DMS were directed by the defendant or in the defendant's presence. Instead, PW2 testified that these revisions were 'done in the presence of TNB and the consultants who were there to approve and consent to the re-location of the actual scope of the work. Wherever there were geological/other changes it was detailed in the DMS ... ' Similarly, when making its claims, the JMS which the plaintiff attached in support of its claims were tabulations in the form prepared under the principal contract and these forms were 'signed by DRB-HICOM's representative, the consultants and us, for all works executed and completed according to the requirements'. None of these forms involved the defendant. The court finds that somewhat curious and unexplained.

[60] Be that as it may, and accepting for a moment that there were additional or variation works (and accepting that these terms refer to one and the same type of work to distinguish such works from original works), it would be reasonable to expect clear distinction and identification of what claims relate to which type of works in the plaintiff's compilation of their 115 certificate of claims. While there is distinction of such works in the 115 claims certificates, there should nevertheless be clear spelling out and tabulation that the works were for a particular value of the original works and another for additional or variation works. The plaintiff had summarised its claims in a 'table and summary' at pp 49–52 of Bundle A2. PW2 told the court that the source information for this summary is to be found in the 115 claims.

[61] However, on examination, the court agrees with the defendant that these source documents do not support the plaintiff's claims. DW1 had pointed out examples of inconsistencies between the details in the summary and the claims certificates – see Q&A 17 in DW1's evidence-in-chief. The court has examined those pages referred to and the court agrees with the defendant's observations which have not been set right by the plaintiff. In fact, the court often found PW2 unable to explain how the plaintiff's claims were put together, how the documents were meant to be read. The court also found

PW2 unable to point out the relevant supporting documents for any of the claims referred to him. Contrasted against the defendant's two witnesses who were witnesses of fact, the court found PW2, extremely wanting in his testimony; his evidence lacking in credibility or any probative value and of little assistance. In short, the court did not believe PW2.

[62] The court agrees with the defendant that the plaintiff appears to be adjusting its figures as the claim proceeds. In fact, the court goes further to say that the plaintiff's claim is simply not supported. It is not a case of just adding up the numbers in a claim for work done; that because the plaintiff had made a total claim of over RM9m for which it has been paid around RM7m, there is some RM2m outstanding. The plaintiff must prove, and prove strictly the detailed makeup of the claim. In this regard, the court finds the evidence weak such as to undermine the plaintiff's claim.

[63] The plaintiff attempted to explain that the format adopted in the preparation of the table or summary was proposed by the defendant. PW2 told the court that the plaintiff was simply following the defendant's instructions or request. This is said to be reflected in its letter dated 23 August 2006 to the defendant (seen at p 37 of Bundle A2) where PW2 said:

> We have compiled the summary to your requirements as stated in your fax dated 15th August 2006.

[64] The court does not find this to be relevant or of any bearing. The fact remains that it was a format; and it was open to the plaintiff to fill in the details. If there were no additional or variation works but were all original re-measured works as per the DMS, then the plaintiff should have stated so. instead, the contents of the summary carries the plaintiff's same claim of additional or variation works as found in the 115 claims certificates. Those 115 certificates set out the conventional or traditional understanding of original and variation works; and not what PW2 had explained.

[65] Therefore, to return to the question posed, where the claim is for both additional and original works as is the case here, it is important that the plaintiff must be able to show that the additional works were ordered by the defendant failing which there can be no vaiid claim. The court does not find any evidence in any form whatsoever of the work for which the plaintiff is claiming is indeed work which was ordered or instructed by the defendant. The evidence presented is messy and thoroughly confused; inconsistent with itself and the oral evidence presented in court. The court accepts the defendant's submissions in this regard.

[66] The plaintiff's mistaken understanding that the defendant must be liable for its present claim emanates from the plaintiff's own direct involvement

in the several layers of contract and subcontracts that exist between several parties in this project. PW2 himself was involved in the plaintiff as well as in Azamme, as its project manager. So was James Selvam who was both the plaintiff's employee and Azamme's project engineer. This is evidenced in the JMS where PW2 had signed as Azamme's project manager and James Selvam had signed as its project engineer. PW2 admitted to this when cross-examined. In fact, PW2 also signed in the same capacity for Azamme in relation to the letter of award dated 7 September 2001 (pp 96–101 of Bundle A3). When he was re-examined by his own counsel, PW2 told the court that he had no authorisation from Azamme to sign that letter of award from DRB-HICOM to Azamme and that he had signed without the defendant's authorisation. This puts paid to the suggestion of authorisation by the defendant.

[67] This multi-tiered involvement of these persons lends weight and truth to the defendant's suggestion that the plaintiff is confused in its understanding of who or which party ought to be liable for its works. In the face of all this evidence presented, the court cannot accept the contention that the plaintiff was authorised to sign on the defendant's behalf quite aside from the fact that there was no evidence led in this respect. There is simply no basis for this allegation.

[68] The plaintiff has urged the court to find that because the defendant had paid against the 115 claims certificates which were accompanied by the JMS, the defendant is estopped from questioning this methodology of payment and the persons who signed the JMS.

[69] With respect, the court again disagrees. The defendant had explained satisfactorily on how the plaintiff was in fact paid. The court accepts the evidence of DW1 that the defendant did not rely on the JMS when making its payment. The defendant produced evidence of the payment certificates which it had issued and which it abided by for payment to the plaintiff. These payment certificates were based on certified re-measurements and they did not simply follow the plaintiff's claims certificates. The facts and circumstances here are entirely different from those presented in *Ribaru Bina Sdn Bhd & Anor v Bakti Kausar Development Sdn Bhd & Anor* [2007] 2 MLJ 221.

[70] A final note on the two tables and summaries prepared by the plaintiff. The plaintiff appears to have compared its payments against those paid to Azamme. Two points can be made here.

[71] First, those payments between those parties have not been shown to be of any relevance or bearing in the contractual arrangements between the present parties. Just because the several contracts are to be read together does not ipso facto mean that the value of work done or monies paid under those

arrangements necessarily mean that the plaintiff must be paid and paid in the sums claimed. Any payments due to the plaintiff are subject to the terms and conditions of the subcontract between itself and the defendant. The second point to be made is that the value of the plaintiff's completed works and thereby the payments to the plaintiff are not shown to be based on a percentage of those contracts. In any event, the scope of those works is entirely different from the present scope of the plaintiff's works.

[72] The court further found that the table and summary of the plaintiff's claims further confirms the defendant's contention that the plaintiff had been paid, and overpaid. Since the plaintiffs works are upon actual quantities and re-measurement, then the plaintiff should rightly be paid against certified claims. The summary shows that the total amounts certified is RM4,209,364.13 for claims certified by Minco (items 1–18 at pp 38–39) and RM2,767,097.55 for works certified by Ranhill (items 19–40 at pp 41), the total amount of certified claims is RM6,976,461.68, as pointed out by DW1. From the same records, the plaintiff stated that the defendant has paid the plaintiff a sum of RM7,469,768.76. Clearly, it has overpaid on the remeasured certified value of the plaintiffs works.

[73] At trial, the above figures were somewhat modified, in evidence, the plaintiff claimed the sum of RM6,336,543.81 as monies due under the original contract and a sum of RM3,443.359.71 for variation works but had informed the court that the defendant had paid a sum of RM7,519,887.64. Regardless the precise figure, the court's observation as set out above maintains. The plaintiff remains as having been fully paid for works under the original contract and there is nothing due to the plaintiff.

[74] For all these reasons, the first issue is necessarily answered in the defendant's favour. The defendant did not and never did instruct the plaintiff on any additional work, even those in the sense explained by PW2.

Second issue: If so, how much of the construction works was to be measured and paid?

[75] In view of the court's findings on the first issue, this second issue does not arise. The plaintiff's work under the contract with the defendant has been fully paid up and the issue of measurement or re-measurement does not arise.

CONCLUSION

[76] Accordingly, I find that the plaintiff has failed to discharge the burden of proving its case on a balance of probabilities – see *Selvaduray v*

Chinniah [1939] 8 MLJ 253. The plaintiff's claim is therefore dismissed with costs of RM40,000 to the defendant.

Plaintiff's claim dismissed with costs of RM40,000.

Reported by Kanesh Sundrum